THE HIGH COURT

[2023] IEHC 298

Record No. 2012/13030P

BETWEEN

ROGER MCGREAL

PLAINTIFF

AND

MAYO COUNTY COUNCIL & WESTPORT TOWN COUNCIL

DEFENDANTS

***EX TEMPORE* JUDGMENT of Ms Justice Hyland delivered 27 April 2023**

1. This is an application to dismiss by reason of delay brought by the two defendants. I am satisfied that based on the notice of motion and the evidence grounding the motion that it is not a motion which seeks a dismissal on the basis that a fair trial is not possible *i.e.* the *O'Domhnaill v Merrick* [1984] IR 151 approach, but rather one based upon delay on the part of the plaintiff.
2. The proceedings allege negligent misrepresentation on the part of the defendants in relation to interactions that took place between the plaintiff and the two defendants in 2006. The plaintiff was interested in buying some land and interacted with the defendants to ascertain the position in relation to road access to the lands in question. In his original Statement of Claim he pleads *inter alia* that the defendants had evaluated and sanctioned access points from the site to a public road, and that they caused him to believe that those access points jointly met with the approval of, and compliance with, the requirements of the roads design section of Mayo County Council and the Westport town engineer. The plaintiff purchased

the lands in spring 1997 and engaged in a pre-planning process in spring 2008 whereby it became clear that the position in relation to road access was problematic.

3. The plaintiff applied for planning permission for the development on his lands on 14 August 2008. Mayo County Council refused planning permission on 10 February 2009. An Bord Pleanála refused planning permission on 9 September 2009. The plaintiff seeks a recovery of the purchase price of the lands as well as special damages and relies on the doctrine of estoppel.

Chronology

4. The chronology of relevant events in the life of this litigation (not intended to be exhaustive) is as follows:

- Plenary summons 21 December 2012;
- Statement of Claim 23 January 2013;
- Defence 5 April 2013;
- Motion to Amend and Motion for Particulars (O'Neill J.) 2013;
- Notice of Appeal against the Order of O'Neill J. 31 October 2013;
- Order permitting amendment of pleadings (McDermott J.) 18 July 2016;
- Delivery of amended Statement of Claim 15 March 2019;
- Notice of Appointment of plaintiff's solicitors 28 March 2019;
- Notice of intention to proceed (on the part of the defendant) 11 November 2020;
- Email from plaintiff to defendant's solicitors indicating intention to seek amendment of Amended Statement of Claim 9 December 2020;
- Amended Defence 17 December 2020;
- Plaintiff's motion to amend Statement of Claim 29 January 2021;
- Plaintiff's request for voluntary discovery 23 March 2021;

- Defendants' motion to strike out proceedings 7 April 2021;

Inordinate and inexcusable delay

5. I have no doubt that there was inordinate delay on the part of the plaintiff. First, the plaintiff did not issue the proceedings until 2012, despite the events the subject of complaint having taken place in 2006. Even if one takes the point of view that the plaintiff was correct to wait until the grant of planning permission was refused by the Board (and there is another, respectable, view to the effect that once he received the preplanning advice making it clear that the road access he had proposed was unlikely to be accepted, he ought to have issued proceedings), the plaintiff still waited 3 years from the accrual of a potential cause of action and therefore there was an obligation on him to move with haste thereafter.

6. In the first year of proceedings, both parties moved the proceedings along briskly but unfortunately that momentum was not maintained from the end of 2013 onwards. However, I do not think it would be fair for me to treat the period from the date of the appeal to the Supreme Court i.e. 31 October 2013 until the date the plaintiff was given liberty to amend by McDermott J. on 18 July 2016 as a period of delay, since the plaintiff was awaiting the outcome of the appeal initially by the Supreme Court, and then the Court of Appeal when the matter was transferred to it. It is true that he did not progress that appeal and that it was ultimately struck out. It is also true that he pursued his attempt to amend his pleadings other than by his appeal and ultimately obtained permission to amend by McDermott J.'s Order rather than through the appeal. However, I think quite properly, the defendants do not seek to urge upon me those years as a period of delay. Rather they focus their attempts on the period from the McDermott J. Order up to the end of 2020.

7. I am quite persuaded that there was inordinate delay from 18 July 2016 i.e. the McDermott Order date, up to the delivery of the amended Statement of Claim on 15 March 2019, being a period of 2 years and 8 months. This delay is particularly egregious given the delay in issuing the proceedings. An attempt is made to explain this delay in the affidavit of Mr. McGreal sworn 30 May 2022 at paragraph 14 where he says that during the latter part of 2016 he focused on the Supreme Court appeal he had lodged against the Order of Mr. Justice O'Neill. He says appeals were being remitted back to the new Court of Appeal and he found it very difficult to get up-to-date information. That excuse is not borne out by the evidence where one sees an email of 26 February 2015 from the Court of Appeal office identifying that no certificate of readiness had been filed in the Supreme Court and therefore it might be awhile before the case was listed in the directions list. The plaintiff is referred to a practice direction for uncertified cases where an application for directions can be made by either party. There is no explanation why he did not make any such application for directions or why he did not contact the solicitors for the defendant to explain the position. Therefore, I cannot accept that as an excuse for the delay.

8. Second, Mr. McGreal says that in the early part of 2017 he accepts he was unable to advance his litigation as efficiently as he would have liked but this was because his mother became very ill, and he had to assist with her care until she passed away on 8 March 2018. No steps whatsoever were taken by him during this period. It is necessary to consider what steps ought to have been taken by the plaintiff at this time. Had the amended Statement of Claim been delivered as had been permitted by the Order of McDermott J. in 2016, the proceedings could have continued to move along. This was a very minor task given that the amendments had already

been approved by the Court. The excuse provided cannot justify the failure to take any steps in this regard.

9. The final excuse proffered is that the plaintiff instructed solicitors to take up the matter in June 2018, but they did not come on record until March 2019 and that they did not progress the litigation in a timely manner. That is not an excuse for delay. First, Mr. McGreal does not explain why there was a delay in the solicitors coming on record. Second, delay on the part of a party's legal advisers will not usually be an excuse for delay absent particular circumstances. No such circumstances were identified here. I therefore find that the delay during this period was inexcusable.

10. That period ended on 15 March 2019 when MS Solicitors provided a notice of intention to proceed on behalf of the plaintiff and delivered the amended Statement of Claim. At that stage, the plaintiff was no longer in default and the onus now fell to the defendants to file an amended defence. It should be said that the amendments permitted by McDermott J. were succinct – there was simply the addition of two pleas, the first to the effect that the plaintiff would rely on the equitable maxim of *res ipsa loquitur* and the second to the effect that the plaintiff would rely on the doctrine of equitable estoppel and that the defendants were estopped from relying on the provisions of s.247(3) of the Planning and Development Act 2000, (providing for pre-planning interaction).

11. At this point the defendants had a choice. They could have either sought to strike out the proceedings for delay, or they could have moved the proceedings along swiftly. They did neither. Rather they waited until 17 December 2020 to deliver an amended defence. Again, the amendments were summary in nature in that there was simply a straight denial of the applicability of the maxim of *res ipsa loquitur*

and a plea that the doctrine of equitable estoppel did not apply given that the defendant had acted in accordance with its statutory function as planning authority. It is very hard to understand why those relatively minor amendments, and the plea in response to them took four years in total.

12. The plaintiff argues that this constitutes delay on the part of the defendants that I must take into account in considering the balance of justice. The defendants say that they were justified in not delivering an amended defence because, in the words of Mr. Hewson, solicitor for the defendants, "*given the delays in the prosecution of the claim as outlined previously, the period of 1 year 8 months was not excessive, given the lack of meaningful engagement by the Plaintiff prior to that date, and in view of the delays already incurred*" (see paragraph 4 of affidavit of 29 July 2022). A similar argument is made in the written submissions where the defendants argue that given the delay already incurred, both before and after proceedings issued, the defendants were entitled to wait a period to see if the matter was progressed by the plaintiff.

13. I cannot accept that argument. The defendants are seeking to have the case struck out because the plaintiff has delayed. If the defendants have also delayed, I cannot ignore that delay in looking at the overall justice of the situation. The delay during the period March 2019 to December 2020 cannot be laid at the door of the plaintiff. The onus was on the defendants to take a step and they did not do so. The fact that they did not act because of previous delay, although perhaps understandable at a human level, means that the time lost at this stage cannot be considered the responsibility of the plaintiff. Therefore, I find no culpable delay on the part of the plaintiff during that time period.

14. The sequence of events after that is also important. On 11 November 2020 the plaintiff's solicitors indicated their intention to seek an amendment. The defendants went ahead and delivered an amended defence, as Mr. Hewson says in an effort to progress the claim (see paragraph 16 of his affidavit grounding the motion of 31 March 2021). What appears to have prompted this motion to strike out was not further inaction on the part of the plaintiff but a step that the defendants clearly anticipated would cause a further delay in getting the case on i.e. a motion seeking to amend the already amended Statement of Claim in a very substantial fashion. It was at that point that the defendant issued this motion.

15. The plaintiff also issued a request for discovery to which the defendants have not yet replied but given that this motion was issued in April 2021 it seems to me that I should not take into account any further steps or omissions post the issuing of this motion.

16. It is a matter of considerable regret that this motion has taken two years to be determined due to a lack of resources in the courts. This has added to the existing delay. That additional delay cannot be laid at the door of either party.

17. In summary, I find that the plaintiff is guilty of inordinate and inexcusable delay for a period of 2 years and 8 months from 2016 to 2019

Balance of justice

18. I must now consider whether the balance of justice means that I should accede to the request of the defendants to strike the proceedings out. I am conscious that the burden of proof rests on the defendants to persuade me that the matter should be struck out. There are a number of different considerations of principle that will always apply in every strike out application. The first is the fact that a strike out ends a plaintiff's claim. The second is the public interest in the expeditious

administration of justice. What differentiates one case from another is the factual matrix onto which these principles are laid.

19. To assist a court in determining these applications, there are a number of considerations that require to be addressed in the context of the balance of convenience. The first and most important will generally be whether there has been prejudice to the defendant by reason of the plaintiff's delay. The conduct of the defendant must also be looked at.

20. Counsel for the defendants asked me to weigh in the balance of justice the likely progress of the case and in particular the delay that is still ahead, given that there is a motion to amend and discovery remains outstanding. He estimates that the case is unlikely to get on before 2024/2025 given that state of affairs. That is a somewhat more difficult matter to assess given that the Court is engaged in a forward-looking rather than a backward-looking exercise at that point. I cannot therefore allocate blame as I am required to do where inordinate and inexcusable delay is asserted. I will return to that point.

Prejudice

21. Where a plaintiff has been guilty of inordinate and inexcusable delay and that delay has obviously prejudiced a defendant, the balance of justice is more likely to favour a strike out. In *Cave Projects Ltd v Kelly* [2022] IECA 245, the Court of Appeal discussed the question of prejudice at p.33 Collins J. observed as follows.

> *"In many (if not most) applications to dismiss based on the Primor principles, the defendant will assert that some specific prejudice has arisen from the delay of the plaintiff. As McKechnie J observed in Mangan v Dockeray, "the existence of significant and irremediable prejudice to a defendant", such as by reason of the unavailability of witnesses, the fallibility of memory recall, loss of*

documentary records such as medical records (Mangan involved a claim for medical negligence) " usually feature strongly" (at para 109 (iv)). The absence of any specific prejudice (or, as it is often referred to in the caselaw, "concrete prejudice") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid. But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis. As a matter of first principle, only such prejudice as is properly attributable to the period of inordinate and inexcusable delay for which the plaintiff is responsible ought to be taken into account in this context. Many of the cases appear to proceed on the basis that, once there is any period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the entire period between the events giving rise to the claim and the date of trial. That does not appear to me to be the appropriate approach."

22. Here it is fair to say that the prejudice alleged is not specific or concrete. Rather it is what may be described as general prejudice. When considering the averments as to prejudice, it is important to recall as set out in *Cave Projects* that the prejudice must be that caused by the delay of the plaintiff and not just delay in general of this

case. Turning now to the evidence, it is averred that since part of the plaintiff's claim relates to alleged misrepresentations during the course of pre-planning meetings in 2006 and despite records held by the defendants, the memory and recall of the relevant witnesses will undoubtedly be an issue given the passage of time (paragraph 18 of Mr. Hewson's first affidavit).

23. In his second affidavit Mr. Hewson addresses the question of prejudice and he says at paragraph 11:

> *"It is clear from the affidavit of Mr O'Gorman that the Plaintiff seeks to make the argument that the Defendants servants or agents were aware that he was not the owner of the land in 2006, quite to the contrary and as is evident from the defence filed in 2013, the Defendants understand that the Plaintiff was the owner. Clearly as this was a matter of fact and contention, the evidence of the town planner and/or engineer is of significant importance, and as such their recall to the period is significantly hampered by the delays incurred"*

He refers to the introduction and proposed amendment of the Statement of Claim in respect of the involvement of Mr. Lyons, senior engineer, and goes on to say:

> *"[i]t would appear he is now being introduced into the Plaintiff's claim over 16 years since the alleged incidents and 10 years since the claim issued and despite the records held by Defendants, I say the memory and recall of all of the relevant witnesses will undoubtedly be an issue given the inordinate passage of time."*

24. Unfortunately, no details are given as to the identity of the town planner and/or engineer identified at paragraph 11. It is probable that this is a reference to Mr. Irwin and Mr. McDonnell, but it is not stated. It could also be a reference to Mr. Lyons or Mr. Wall. There is no identification of whether the town planner and engineer referred to remain working for the defendants and whether there has been

any interrogation of them in relation to their recall of the events. It is relevant in this regard that the affidavits in respect of prejudice have been sworn by the solicitor for the defendants and not by a person in the office of the defendants or one of the proposed witnesses who would be in a better position to aver to defects in recall and to explain the problems caused by the plaintiff's delay.

25. Certain arguments were raised by both counsel in argument in relation to the question of prejudice in this case. The first point was whether oral evidence will be required. I am satisfied that it will. There is clearly a dispute as to the belief of the defendants as to whether the plaintiff owned the lands at the relevant time. That may or may not be legally relevant to the plaintiff's claim, but it is an issue of fact that will have to be resolved. Neither party is asserting that documents exist such as will resolve that matter.

26. More generally, the plaintiff refers in his pleadings not just to written material i.e. the memo of 12 December 2006 and August 2006 but also to meetings and phone calls between October and December 2006 with the defendants and with the National Roads Authority. This is not a case where documents can determine the entirety of the issues, particularly given the nature of the claim made by the plaintiff, in particular the pleas of negligent misrepresentation/misstatement and estoppel. Those pleas require that, at the hearing, the events that took place between August 2006 and December 2006 be examined by the Court. But simply deciding that oral evidence will be required and that a significant amount of time has passed is not enough to establish irremediable prejudice.

27. The second point raised is the question of documentation. I fully accept that, as counsel for the defendants identified, the mere presence of documents alone cannot be treated as determinative since there may be a dispute about what a document

means, and the surrounding context and that oral evidence may be required in this context. Indeed, this may well be the case in the consideration of the meaning and/or correct interpretation of the memo of 12 December 2006.

28. Nonetheless, if the defendants are seeking to persuade a court that they are prejudiced by the lapse of time, and the lack of recall of their witnesses, it is incumbent upon them to demonstrate why oral evidence is so important and why documents cannot buttress failing memories. Here the defendants have failed to describe the extent of documentation they hold. The plaintiff has asserted that if the defendants had treated this as a pre-planning consultation, as is pleaded by the defendants, then they will have kept the records given their obligation to do so under s.247(b) of the Planning and Development Act 2000. This may or may not be the case. But that argument at least imposes an obligation on the defendants to explain why their documentation is insufficient to plug the memory gap. No such explanation has been provided.

29. Finally, I should address the point made by the plaintiff that the elapse of time will make no difference to the defendant's recollection because they were in a position in 2020 to file a defence that has some positive pleas, and thus must be taken to have a full recall or at least a sufficient recall of events. I do not accept that argument. The amended defence in 2020 simply pleaded to the two additional legal pleas on *res ipsa loquitur* and estoppel. The relevant defence is that filed in 2013. That is now 10 years ago. The fact that the defendants were able to file a defence in 2013 does not mean that memories will not potentially have been affected by the 10-year lapse of time. But the Court needs to know whose memories are affected, why those particular memories are required in the context of the case, and how badly they are affected. None of this is explained by the defendants.

30. Bearing in mind all of these factors, it seems to me that the defendants have established a moderate, generalised prejudice by reason of the elapse of time but have failed to identify why the 2 years and 8 months delay that is the responsibility of the plaintiff has caused them such prejudice as to warrant a strike out. My conclusion in this respect affects the weight I give to the issue of prejudice.

Acquiescence of the defendants

31. The plaintiff has argued that the defendants have acquiesced in the delay by their conduct and as such are barred from seeking to strike out the proceedings. It is true that the defendants filed an amended defence thus signalling their intention to proceed, as indeed was averred by Mr. Hewson, but then changed direction and brought this motion when the plaintiff sought to amend the pleadings and sought discovery. That did mean the plaintiff had incurred certain expenses that he would not have otherwise incurred. However, on the other hand, one must bear in mind that the defendants had not seen the very extensive amendments proposed when they filed their amended defence as far as I can ascertain. It is understandable that the defendants were concerned about when the case might get on given the extent of the amendments and the nature of the discovery sought, and that this prompted the motion. I think that the acquiescence, such as it was, is insufficient to preclude the defendants from bringing this motion or being debarred from relief *per se*.

Future progress of the case

32. Counsel for the defendant has submitted that when considering the balance of justice, I must take into account when this case is likely to get on. But as identified above, this is difficult for me to do given the variables, one of the most important of which is the speed at which both parties will advance the proceedings. It is hard to predict when this case will be heard. Moreover, in a motion such as this, I am primarily concerned with the question of delay on the part of the plaintiff, although

it is true that I can look at the overall situation in the balance of justice context. It seems to me that it would be going too far in that context were I to strike out a case not because of past delay but because of future unascertained delay that cannot be laid at the door of either party because it has not yet taken place. Therefore, I give little weight to this consideration in the context of the strike out application.

Conclusion

33. In this case, it seems to me that, by an admittedly narrow margin, the balance of justice does not favour striking out the plaintiff's claim. I share the defendants' concern that the delays in this case mean that events from 2006 are likely to be determined in 2024/2025. This is a deeply undesirable state of affairs.

34. But much of the elapse of time since 2006 is not the responsibility of the plaintiff. Some of that time was taken by the delay in issuing proceedings, which cannot be treated in a strike out application as an independent period of delay but rather is relevant to the obligation on the plaintiff to move with alacrity. The plaintiff is entitled under the Statute of Limitations to begin proceedings within a specified time. Some of the delay was caused by the time taken for the appeal to the Supreme Court to be disposed of. Some of it is due to the defendants' delay. Some of it is due to the delay of this Court in determining this motion. Only a relatively small proportion of it was caused by the plaintiff's delay. Moreover, it has not been shown that the defendants are seriously prejudiced by the delay between 2016 and 2019 and cannot ameliorate or address that prejudice through the use of documentary evidence. Further, the defendants have themselves have been guilty of delay.

35. In all of the circumstances, I have concluded that the balance of justice does not in my view warrant a strike out and I therefore refuse the relief.